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IN THE

Supreme Court of the United States

October Term, 1972

No.

MICHAEL ANTHONY TOMEO,

Petitioner,

v.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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The Petitioner, Michael Anthony Tomeo, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on May 15, 1972.

OPINION BELOW

The Opinion of the Court of Appeals, not yet reported, appears in the Appendix ("App.") hereto at p. 1a, *infra*. No Opinion was rendered by the District Court for the District of Colorado.

JURISDICTION

The Opinion of the Court of Appeals for the Tenth Circuit was rendered on May 15, 1972. A timely Petition for Rehearing was denied on June 14, 1972 (App., p. 6a, *infra*), and this petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is evidence of the *receipt* of telephone calls made from another State regarding wagering sufficient to support a conviction under 18 U.S.C. §1084(a) which makes illegal only "the *transmission*"[1] in interstate commerce of such communications?

2. When Congress specified "transmission" in one subsection of a statute and "transmitting or receiving" in another subsection of that statute, may the subsection which uses the word "transmission" alone be interpreted as if – like the other subsection – "transmission" were used in conjunction with the word "receiving"?

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[1] Emphasis is added throughout this petition.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §1084, 75 Stat. 491, reads in pertinent part as follows:

> "(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for *the transmission* in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for *the transmission* of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.
>
> "b) Nothing in this section shall be construed to prevent *the transmission* in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for *the transmission* of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.
>
> * * *
>
> "(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used

for the purpose of *transmitting or receiving* gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber * * * ."

STATEMENT OF THE CASE

The Indictment

The indictment against Petitioner charged that "being engaged in the business of betting and wagering, [he] did knowingly use and cause the use of a wire communication facility, that is, the interstate telephone, for the transmission in interstate commerce *from* Monroe, Wisconsin, *to* Denver and Adams County, Colorado, of information assisting in the placing of bets and wagers on sporting events and contests, such information consisting of the point spread on college and professional football games *and* the actual placing of bets and wagers on such games, all in violation of Title 18, United States Code, Section 1084" (App., p. 7a, *infra*). The two Counts in the indictment were identical except as to date. Count I in effect covered the 1968-1969 football season; Count II, the 1969-1970 football season.

The Trial

For purposes of this petition, it may be considered as conceded that Petitioner was engaged in the business of betting and wagering. The sole issue is whether he ever used an interstate wire communication for transmission in interstate commerce in violation of 18 U.S.C. §1084(a).

At the trial, only one witness, a Mr. Huber, testified concerning this aspect of the case.

Mr. Huber testified he had never seen Petitioner outside of Denver and that *he* had placed calls *from* Monroe, Wisconsin, which was the place where he resided and engaged in the lumber business, *to* Denver, Colorado, where Petitioner was when Mr. Huber talked to him. At times Mr. Huber obtained from Petitioner information such as the point spread which was readily available in any public newspaper, and at other times placed wagers with Petitioner.

There is no evidence whatsoever that Petitioner ever initiated any of the calls. The evidence showed only that Petitioner, while in Denver, had *received* telephone calls from Wisconsin which had been placed and initiated by Mr. Huber. Also, there was no evidence that Petitioner had ever been in Wisconsin and, *a fortiori*, there was no evidence that Petitioner had been involved in any way with the transmission of bets or information, *from* Monroe, Wisconsin *to* Denver and Adams County, Colorado, as charged in the indictment.

At the conclusion of the Government's case, Petitioner moved for a judgment of acquittal on the ground that there was insufficient evidence to sustain any conviction under the statute. The motion was denied. Thereafter, Petitioner was convicted on both Counts and was sentenced to consecutive terms of two years on Count I and one year on Count II for a total of three years.

The Court of Appeals Decision

In affirming the conviction, the Court of Appeals expressly recognized that there was a division among the Circuits as to the interpretation of the term "transmission"

as used in 18 U.S.C. §1084(a). The Court specifically acknowledged that two decisions had held that "transmission" did not include reception of, but extended solely to sending or initiating, the interestate wire communications.

Those two decisions are *Telephone News System, Inc. v. Illinois Bell Telephone Co.*, 220 F. Supp. 621 (N.D. Ill. 1963), *affirmed*, 376 U.S. 782 (1964), hereinafter referred to as "*Telephone News*"; and *United States v. Stonehouse*, 452 F.2d 455 (7th Cir. 1971), hereinafter referred to as "*Stonehouse*". To the contrary is *Sagansky v. United States*, 358 F.2d 195 (1st Cir.), *cert. denied*, 385 U.S. 816 (1966), hereinafter referred to as "*Sagansky*".

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RECOGNIZES AND REFLECTS A DIVISION AMONG THE CIRCUITS AS TO THE CORRECT INTERPRETATION OF SECTION 1084(a).

The Court below expressly acknowledged, "At present the Circuits do not agree on the meaning and scope of section 1084(a)" (App., p. 3a, *infra*). Dramatically reflecting that conflict is the contrast between the judgment in this case and that in *Stonehouse*. In this case, the Court of Appeals affirmed a conviction where there was no evidence that Petitioner had initiated any calls and where the evidence showed *only the receipt* of interstate calls by Petitioner. Contrastingly, in *Stonehouse* the Court reversed a conviction under the identical statute where the evidence showed *only the receipt* of information transmitted over a telegraph ticker tape. On the critical issue of statutory interpretation, the Seventh Circuit in *Stonehouse*

declared: "Although we recognize that there is language in at least one case involving the use of the telephone that points in the other direction, we believe that the coverage of paragraph (a) of §1084 is limited to prohibited transmissions and does not encompass mere reception." 452 F.2d at 456-457 (footnote omitted).

The First Circuit in *Sagansky* held that this statutory provision could include reception; see also *United States v. Winston*, 267 F. Supp. 555, 561 (S.D. N.Y. 1967). In *Stonehouse* the Seventh Circuit determined it could not follow *Sagansky* on the basis of the statutory coverage. In this case, on the other hand, the Tenth Circuit elected to follow *Sagansky*, expressly declining to follow *Stonehouse*. Both the decision below and *Sagansky* evidence more a judicial formulation of the Congressional intention than an analysis of the statutory language actually adopted and enacted by the Congress. In the decision below, for example, the Court concluded that "It is unlikely in framing section 1084(a) that Congress considered betting transactions to move in but one direction in the use of the telephone" (App., p. 5a, *infra*). See also, *Sagansky*, 358 F.2d at 200.[2]

As all the decisions have recognized, the leading case holding that this statute cannot properly be interpreted to include receipt is *Telephone News*. Its reasoning from

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[2] While the petition for certiorari in *Sagansky*, O.T. 1966, No. 131, included the question being presented in this petition, its primary thrust was directed to the issue of entrapment. Moreover, inasmuch as the petition in *Sagansky* was filed prior to the decision in *Stonhouse*, it could not and did not present the square conflict among the Circuits which is presented herein.

the statutory text, not directly answered in any of the subsequent cases, was as follows:

> "We must reject the theory that 'transmission' as used in subsection (a) means sending or receiving. Whatever validity there might be to the argument that 'transmission,' in some contexts, has a meaning broader than the term 'sending,' it is plain that Congress meant it as 'sending' in this statute. Subsection (d) uses the term 'transmitting or receiving,' and it is illogical to suppose that Congress would not have used both terms in both subsections had it meant to include 'receiving' in subsection (a). *We shall not assume that 'transmission' has one meaning in subsection (a) and another in subsection (d), nor that 'receiving' in subsection (d) is superfluous.*" 220 F. Supp. at 638.

Manifestly, a conflict exists on this issue in the Federal Courts. The resultant uncertainty and confusion is a disservice to the law and should not be allowed to stand. It permits defendants who have received but not initiated wire communications to stand convicted in some Circuits while convictions based on like evidence are reversed elsewhere. Such inconsistent administration of a Federal criminal statute can be reordered only by decision of this Court.

II. THE DECISION BELOW IS IN CONFLICT WITH THE APPLICABLE DECISION OF THIS COURT.

In *Telephone News*, ruling on the appeal from the decision of the three-judge Court, this Court necessarily gave consideration to the merits of the statutory issues at bar. In that case which included the holding that "transmission" cannot be interpreted in this statutory context to

include receiving as well as sending, this Court without opinion entered a *per curiam* judgment of affirmance.[3] The decision below, admittedly at war with *Telephone News*, is thus in conflict with a decision of this Court.

III. THE DECISION BELOW DECIDES AN IMPORTANT QUESTION OF STATUTORY INTERPRETATION IN THE FEDERAL CRIMINAL LAW CONTRARY TO THE EXPRESS LANGUAGE ENACTED BY THE CONGRESS.

Analysis of the text of Section 1084 demonstrates or strongly suggests that the decision below and *Sagansky* are in error, and *Telephone News* and *Stonehouse* correct. First of all, the contrast in language between (a) and (d), the keystone of the *Telephone News* holding, see page 8, *supra*, appears unanswerable. The *Telephone News* reasoning based upon the textual contrasts actually adopted by the Congress appears plainly correct.

If "transmission" in Section 1084 included "receiving", there would have been no need to add the verb "receiving" in (d). The plain effect of the decision below is to render "receiving" in (d) a redundancy. To this patent demonstration of the true Congressional intention neither the decision below nor *Sagansky* assayed any response whatever. The dispositive principles of statutory construction have been clearly elucidated by this Court. "The statute admits a reasonable construction which gives effect to all of its provisions. In these circumstances we will not adopt a strained reading which renders one part a mere redundancy." *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307-308 (1961). As this Court has repeatedly held,

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[3] A "dismissal or affirmance of an appeal is a decision by the Supreme Court having precedential value * * *." Stern & Gressman, *Supreme Court Practice* (4th ed. 1969) 230-231; *cf. Barton v. Sentner*, 353 U.S. 963 (1957).

"It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed." *Inhabitants of Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883); *United States v. Menasche*, 348 U.S. 528, 538 (1955).

Moreover, analysis of Subsections (a) and (b) confirms that the Congress drew a line between sending or initiating and receiving, and included only the former in the verb and concept of "transmission". Subsection (a), for example, makes illegal the knowing use of a wire communication facility "for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers * * *." Clearly, "transmission" in that context denotes sending, and sending only. Only a sender may transmit a wire communication which entitles the recipient to receive money or credit. The recipient can hardly be authorizing his own money or credit; they must necessarily be sent to him by another at the other's initiative.

Similarly, Subsection (b) utilizes "transmission" in a context which signifies sending or initiating only. It exempts two types of "transmission". The first is transmission "for use in news reporting of sporting events or contests * * *." Again, this Congressional reference to "transmission" denotes sending or initiating the wire communication. For it is the other party, the recipient of the communication sent or initiated by another, who is using it in the news reporting. The second exception is "the transmission of information assisting in the placing of bets or wagers on a sporting event or contest *from* a State where betting on that sporting event or contest is legal *into* a State in which

such betting is legal." Beyond doubt, the specification of "from" and "into" denotes movement in a single direction. Congress directed the statutory condemnation only to the sender or initiator of the wire communication.

It bears reiteration that when Congress intended to encompass "receiving" it expressed that intention clearly and unambiguously. In Subsection (d) Congress did indeed cover "transmitting or receiving", demonstrating its ability to refer to the act of receiving expressly when it desired to embrace that conduct by the statute, and demonstrating beyond peradventure of doubt the distinction it desired to draw, and was in terms drawing, between receiving and transmitting or initiating.

To permit the decision below to pass unreviewed is thus to disregard or derogate the manifest difficulties in harmonizing that decision with the actual text of the statute. There are genuine and serious problems of statutory construction meriting and indeed requiring definitive word from this Court to preclude injustice and conflict.

CONCLUSION

This is an appropriate case in which to resolve the conflict among the Circuits, and insure that henceforth this statutory provision will be applied uniformly and in conformity with the Congressional enactment and the decisions of this Court. These issues are presented herein clearly and cleanly. This case presents a timely opportunity for a conclusive determination by this Court.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

[Filed, May 15, 1972]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 71-1647 – MAY 1972 TERM

UNITED STATES OF AMERICA, *Appellee,*	)	
	)	Appeal From The
	)	United States District Court
v.	)	For The District of Colorado
	)	(D.C. No. 70-CR-299)
MICHAEL ANTHONY TOMEO, *Appellant.*	)	

V. G. Seavy, Jr., Denver, Colorado (James G. Johnston, Denver, Colorado, with him on the Brief), for Appellant.

W. Allen Spurgeon, Assistant United States Attorney (James L. Treece, United States Attorney, and Milton C. Branch, Assistant United States Attorney, with him on the Brief), for Appellee.

Before CLARK*, Associate Justice, SETH and McWILLIAMS, Circuit Judges.

SETH, Circuit Judge.

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* Associate Justice of the United States Supreme Court, Retired, sitting by designation.

This is a direct appeal from a conviction of interstate gambling in violation of 18 U.S.C. §1084(a).

The evidence shows that the appellant was actively engaged in bookmaking in Colorado. Mr. Huber, the Government's only witness to testify as to the interstate character of the offense, is a Wisconsin businessman who had met appellant in Denver. The appellant provided Mr. Huber with his phone number and explained that if Huber wished to place a bet he should call the appellant in Denver. At one point the phone number was changed. Huber placed two or three calls a week during two successive football seasons, calling early in the week to get the odds, and calling back on Saturday or Sunday to place his bets. He testified he did not place straight bets but parlayed three or four teams with the Doyle system, which he could not bet elsewhere. Nearly all of the calls were placed from Monroe, Wisconsin, to Denver, Colorado, and the witness talked to Mr. Tomeo personally. The witness Huber testified he came to Denver from time to time, saw Mr. Tomeo socially, and had discussed the possibility of Mr. Tomeo being a representative of Mr. Huber's business. The two had been acquainted since 1963 or 1964.

There is no question that the appellant was engaged in the business of betting and wagering, the question is whether appellant's acts constituted a crime within the meaning of the statute under which he was charged. 18 U.S.C. §1084(a) reads:

> "Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate . . . commerce of bets or wagers or information assisting in the placing of bets

> or wagers on any sporting event . . . , or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both."

As to the actual placing of bets, appellant argues that the word "transmission" in the statute means sending and not receiving, and it is pointed out that appellant only received the bets, Huber having placed them. With regard to the transmission of odds, appellant argues that the indictment charges transmission "from Monroe, Wisconsin, to Denver and Adams County, Colorado," and it is urged that it would have been physically impossible under the charge for the Denver-based appellant to have transmitted the information.

At present the Circuits do not agree on the meaning and scope of section 1084(a). In *Telephone News System, Inc. v. Illinois Bell Telephone Co.*, 220 F. Supp. 621 (N.D. Ill. 1963), *aff'd* 376 U.S. 782, a case involving recorded horse racing information to anyone calling a particular number, a three-judge court rejected a Government contention that the word "transmission" means receiving as well as sending. The court there held that Congress there meant to use the term "transmission" as sending only, because in other subsections the term "transmission or receiving" was used. Hence both words would have here been used if Congress had intended sending as well as receiving. In a case involving the receipt of ticker tape transmissions, the Seventh Circuit adopted the same construction. *United States v. Stonehouse*, 452 F.2d 455 (7th Cir. 1971).

The Government's position received approval in *Sagansky v. United States*, 358 F.2d 195 (1st Cir. 1066), *cert. denied*, 385 U.S. 816. The court there said:

> "The gist of this contention is that the offense is committed by the one who initially sends in the bet and not by the one who receives it; in other words, the meaning of 'transmission' as used in this statute does not embrace the act of receiving. While this might be a proper construction of the term 'transmission' taken out of context, §1084(a) does not punish the mere transmission of bets or wagers, but rather the 'use' of interstate wire communication facilities for their transmission. When a person holds himself out as being willing to make bets or wagers over interstate telephone facilities, and does in fact accept offers of bets or wagers over the telephone as part of his business, we think it is consistent with both the language and the purpose of the statute to hold that he has 'used' the facility for the transmission of bets or wagers."

The differing results also arise from a different construction of the words "to use" the communication facility. As it pertains here, section 1084(a) proscribes *the use* of the telephone for the "transmission" in interstate commerce of bets or wagers or information assisting in the placing of bets or wagers. The conclusion in *Telephone News* that transmission means sending and not receiving is necessarily predicated on the notion that "use" connotes only the idea of immediate utilization, or single event, that is, the phone is used by the person who picks it up and places the particular call. In *Sagansky*, on the other hand,

the concept of "use" is more encompassing, there it was concluded that the "use" of a wire facility contemplates the broader notion of converting the facility to one's service, that is, customarily employing or making a practice of availing oneself of the facility. In our opinion, an unsophisticated and practical reading of the statute compels the latter interpretation. In reaching this conclusion, we give consideration, as did the court in *Stonehouse*, to the fact that the telephone is designed for a two-way conversation and exchange of information. If we were to accept the appellant's contention, we would effectively deny that any discussion or exchange took place, and we find that assumption rather strained. We also note that an interpretation of use of the wire facility which is limited to the isolated *sending* of messages does not meet the basic purpose of the statute and renders its scope more limited than an everyday experience with the telephone would dictate. The statute deals with bookmakers – persons "engaged in the business of betting or wagering." Bookies *take* bets, they receive them, they handle them; it is a transaction requiring mutuality or a meeting of minds. It is unlikely in framing section 1084(a) that Congress considered betting transactions to move in but one direction in the use of the telephone.

We have considered appellant's remaining arguments and find them to be without merit.

AFFIRMED.

MAY TERM – June 14, 1972

Before Honorable Tom C. Clark, Retired Associate Justice, Honorable Oliver Seth and Honorable Robert H. McWilliams, Circuit Judges

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UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
v.	)	No. 71-1647
MICHAEL ANTHONY TOMEO, *Defendant-Appellant.*	)	

This matter comes on for consideration of the petition for rehearing filed by appellant in the captioned case.

Upon consideration whereof, the petition for rehearing is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

A true copy
Teste

Howard K. Phillips
Clerk, U.S. Court of
Appeals, Tenth Circuit

By /s/ Anne Cabot
Deputy Clerk

[Filed, December 3, 1970]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA, *Plaintiff,*	)	
	)	CRIMINAL NO. 70-CR-299
v.	)	
	)	INDICTMENT
MICHAEL ANTHONY TOMEO, *Defendant.*	)	18 U.S.C., Section 1084

COUNT I

The Grand Jury charges:

That during the period from on or about the first day of November, 1968, to on or about the 15th day of January, 1969, the exact dates being to the Grand Jury unknown, in the District of Colorado, Michael Anthony Tomeo, being engaged in the business of betting and wagering, did knowingly use and cause the use of a wire communication facility, that is, the interstate telephone, for the transmission in interstate commerce from Monroe, Wisconsin, to Denver and Adams County, Colorado, of information assisting in the placing of bets and wagers on sporting events and contests, such information consisting of the point spread on college and professional football games and the actual placing of bets and wagers on such games, all in violation of Title 18, United States Code, Section 1084.

COUNT II

The Grand Jury further charges:

That during the period from or or about the first day of November, 1969, to on or about the 15th day of January,

1970, the exact dates being to the Grand Jury unknown, in the District of Colorado, Michael Anthony Tomeo, being engaged in the business of betting and wagering, did knowingly use and cause the use of a wire communication facility, that is, the interstate telephone, for the transmission in interstate commerce from Monroe, Wisconsin, to Denver and Adams County, Colorado, of information assisting in the placing of bets and wagers on sporting events and contests, such information consisting of the point spread on college and professional football games and the actual placing of bets and wagers on such games, all in violation of Title 18, United States Code, Section 1084.

JAMES L. TREECE
United States Attorney

/s/ By: W. ALLEN SPURGEON
Assistant United States Attorney

A TRUE BILL:

/s/ Joseph D. Raulerson, Jr.
Foreman